Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-236

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Tennessee
at Nashville
Davidson Equity

MOTION TO DISMISS OR AFFIRM

On Behalf of Appellee, Metropolitan Government of Nashville and Davidson County, Acting by and Through the Electric Power Board of Said Government

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METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
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v.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Tennessee
at Nashville
Davidson Equity

MOTION TO DISMISS OR AFFIRM

On Behalf of Appellee, Metropolitan Government of Nashville and Davidson County, Acting by and Through the Electric Power Board of Said Government

The Appellee, Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board of said Government, pursuant to Rule 16, respectfully moves this Honorable Court to dismiss the above entitled

appeal or in the alternative to affirm the judgment of the Supreme Court of Tennessee, on the following grounds:

1. The judgment appealed from rests on an adequate non-federal question. The only question raised on appeal in the Tennessee Supreme Court and Court of Appeals by Appellant as to this Appellee was estoppel which is not involved in the constitutional issues raised in this appeal.

2. The appeal does not present a substantial federal question.

3. Appellant has no right to appeal under 28 U.S.C.A. 1257(2).

STATEMENT

All other appellees operate under franchise from the Metropolitan Government of Nashville and Davidson County. This Appellee alone does not operate under a franchise. It operates as an independent agency of the Metropolitan Government under the name Nashville Electric Service and is referred to by that name, as the Electric Power Board or NES. (J.S., p. 6) Appellant's suit in Chancery sought the judgment of the Chancellor that the obligations of these franchise agreements between the City and the utility companies were impaired by T.C.A. §13-828, et seq. It also sought a judgment that the obligations of contracts between Appellant and the United States Government (HUD) and between Appellant and the Metropolitan Government were impaired by said statute. (J.S., pp. 6, 7) The original complaint, as amended, sought relief against Appellee (NES) on the basis of estoppel. (A. 11) The Chancellor found that Appellee (NES) was not estopped and sustained its counterclaim or cross-complaint. (A. 15, 16) Prior to enactment of T.C.A. 13-828-831, all Appellees had to bear the burden of relocation expenses. (A. 17) Appellee (NES) was not required

to pay these expenses because of any franchise or other contractual obligation (as alleged against all other Appellees) but as a requirement under the common law. (A. 21) *Pack v. Southern Bell*, 215 Tenn. 503. 387 S.W.2d 789, 1965.

Appellant's Assignments of Error in the Court of Appeals were based on: ". . . the Chancellor's holding that the statute is constitutional as applied to it, his finding that plaintiff (Appellant) is not a party to the franchise agreements between Metro and defendants, and his conclusion that NES is not estopped to rely on T.C.A. § 13-828—13-831." (A. 25) The Court of Appeals also found no basis on which to hold this Appellee, Electric Power Board (NES) is estopped from claiming the benefits of the statute in question. (A. 32) After deciding that this Appellee was not estopped to claim the benefit of being reimbursed its relocation cost under the statute, the Court of Appeals stated:

> "In addition, we note that it would indeed be odd if NES were held estopped to accept the benefits of a statute because its truthful representations were relied on by plaintiff in entering into contracts, when we have already held that any impairment of the contracts themselves by that statute is entirely valid and constitutional as far as plaintiff is concerned."

The questions presented for review by Appellant raise the constitutional questions:

1. Does Appellant, as a governmental agency, political subdivision of the State, have protection of the Constitution against impairment of obligations of its contracts.

2. Did the State by enactment of T.C.A. 13-828, et seq., unconstitutionally impair any contracts. (J.S.. p. 3)

No question is raised challenging the Tennessee Court's decision holding that this Appellee is not estopped to recover its relocation cost under the statutes.

The Court of Appeals opinion on the constitutional questions applied only to the franchise agreements held by all other Appellees and not to this Appellee. The assumptions made "arguendo" by the Court are set out in Appellant's Statement of the Case. (J.S., p. 4) These assumptions apply only to the contractual relationship created by the franchise agreements and not to any alleged contractual relationship between Appellant and this Appellee. (A. 25) The Court of Appeals dispensed with Appellant's appeal against this Appellee in its decision rejecting Appellant's contention that NES, either due to its own actions or those of Metro, is estopped to claim reimbursement of its relocation expenses under the statute. (A. 24)

The dispositive factor, upon which the Court of Appeals rested its decision, was that Appellant, an agency of the State, had no protection under the Contract Clause of both the State and Federal Constitutions. It only assumed for argument that Appellant was a party to all contracts involved, that the franchise agreements required the defendants (all Appellees here except Appellee (NES) to relocate their facilities at defendant's cost and that there has been some impairment of all contracts involved. The State Court made no finding on these questions because its disposition of the case did not require it. It did not find a State statute valid as against the charge of unconstitutional impairment. (A. 26) It results that both constitutional questions raised by this appeal can be answered in favor of Appellant and still appellant could not recover from this Appellee (NES).

In addition to the franchises of Appellees except Appellee (NES), Appellant had contract with HUD and Metropolitan Government. (J.S. pp. 6, 7) There is no allegation that Appellee (NES) was a party to either. Appellant sought by estoppel to deny this Appellee the right to recover its relocation costs under the statute. This contention has been rejected by the State courts and is foreclosed. It is not before this Court and therefore, Appellant has failed to establish jurisdiction since this Appellee

has no obligation under any contracts which could possibly have been impaired by the Tennessee statute. Appellant fails to establish the jurisdiction of this Honorable Court over this Appellee involving the constitutional questions proposed in the Jurisdictional Statement. The appeal is without substance. raises no substantial federal questions and is frivolous as to this Appellee.

ARGUMENT

FIRST GROUND: The judgment rests on adequate non-federal question.

1. As to this Appellee, the appeal is frivolous. It is apparent that the only basis of relief against this Appellee, which has no franchise, is estoppel. No federal question can be raised unless the threshold issue of estoppel is decided against this Appellee. Unless this Appellee is determined to be estopped to rely on the provisions of the Tennessee statute there is no kind of agreement existing between these two parties the obligations of which could possibly be impaired. Without that relationship, which Appellant sought to establish, but failed to establish, by estoppel in the State courts, there cannot be an impairment and consequently, the Contract Clause of the Federal Constitution cannot be violated by the State statute. Before the enactment of the State statute, Appellee (NES) was required to relocate its facilities at its own expense under common law, *Pack* supra, 215 Tenn. 503, 387 S.W.2d 789, 1965, and not because of obligations of a franchise or contract. The judgment appealed from, as to this Appellee, rests on the State Court's decision on estoppel in its favor. This determination is both adequate and non-federal.

SECOND GROUND: No substantial federal question is raised.

In light of the prior decisions of this Honorable Court, there is no substantiality and this appeal should be dismissed without opportunity for oral argument.

(Wright, Miller, Cooper, Gressman, Federal Practice and Procedure: Jurisdiction §4003, N. 4)

> "The test of quality required before a federal question could support jurisdiction was that

> although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

Id., §4014 at 635, cited *Equitable Life Assurance Society v. Brown*, 1902, 23 S. Ct. 123, 187 U.S. 308, 47 L. Ed. 190.

The rule of this Honorable Court is expressed by former Chief Justice Warren at note four (4) under heading "Full Argument", in the Jurisdictional sections of the Wright, Miller, Cooper, Gressman work:

> "As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we considered substantiality in the light of prior decisions, the appeal will be dismissed without opportunity for oral argument." Id. § 4003 at 501.

No case cited by Appellant supports its position that, as an agency of the State, it has protection against impairment of obligations of contracts under the Contract Clause. The prior decisions of the Court, without exception, support the following proposition:

> A municipal corporation, created by a state for better ordering of government has no privileges or immunities under Federal Constitution which it may invoke in opposition to the will of its creator.
>
> *Williams v. Mayor and City Council of Baltimore*, 289 U. S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015.

Mr. Justice Cordoza delivered the opinion of the Court and cited the following authorities:

> *Trenton v. New Jersey*, 262 U. S. 182, 67 L. Ed. 937, 43 S. Ct. 534, 29 ALR 1471; *Newark v. New Jersey*, 262 U. S. 192, 67 L. Ed. 943, 43 S. Ct. 539; *Worcester v. Worcester Consol. Street R. Co.*, 196 U. S. 539, 49 L. Ed. 591, 25 S. Ct. 327; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 63 L. Ed. 1054, 39 S. Ct. 526, P.U.R. 1919E, 179; *Risty v. Chicago R. I. & P. R. Co.*, 270 U. S. 378, 390, 70 L. Ed. 641, 651, 46 S. Ct. 236; *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145, 156, 74 L. Ed. 234, 239, 50 S. Ct. 71. Id. at 40, 41.

Appellant cites the United States Trust Co. case as supporting its Argument No. 1 that as a local governmental agency, it is protected against legislative impairment of the obligations of its contracts. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). The critical difference between United States Trust Co. fact and the facts in this case, is that the plaintiff appellant in United States Trust Co. is not a local governmental agency but a trustee and holder of Port Authority bonds who challenged the constitutionality of legislation which impaired the obligations owed by the Port Authority to the bondholders.

The State Court in the case sub judice held that the dispositive factor is that Appellant, as an agency of the State of Tennessee, cannot claim the constitutional protection of the Contract Clause against the alleged impairment of these contracts by the State. The Court cited as authority *City of Worcester v. Worcester Consolidated Street Railroad Co.*, just as Mr. Justice Cordoza did in *Williams v. Baltimore*, Id.

The State Court correctly held that appellant has no protection under the Contract Clause and properly reviewed the authorities including prior decisions of this Honorable Court. (A. 25-30)

Appellant argues the "less drastic means" test and refers to United States Trust Co., supra, id. at 29-31, 97 S. Ct. at 1522, 52 L. Ed. at 114-15, and seeks to have this Court influenced by a quotation from that case, "(A) State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

This Appellee submits that the question of the impact of the statute involved is not before this Court even assuming for argument, that Appellant has protection under the Contract Clause. There will be no financial impact on Appellant because none of its own funds are involved. It obtains two-thirds of its funds from the Federal Government (HUD) and one-third from the Metropolitan Government. (A. 20) Neither the Federal or Metropolitan Governments are parties to this action. In this connection, Appellee (NES) does point out that the Tennessee Legislature in its FINDINGS AND DECLARATIONS, made a strong statement supporting its action as being in the public interest under the police power. This is contained in T.C.A. 13-828. (A. 1)

Appellant argues that the burden placed on Federal and State taxpayers is unreasonable and that it is not demonstrated that the impairment was essential to achieve an important state purpose. (J.S. p. 16) The above referred to sections of the Tennessee Code refute this argument. Further, Appellee (NES) insists that Appellant has alleged no right to have the constitutional rights of taxpayers adjudicated in this cause. Neither has it alleged any authority to have rights of the Federal Government (HUD) and the Metropolitan Government adjudicated. Appellant has no standing to bring such constitutional questions before this Honorable Court. This appeal is frivolous on this ground and should be dismissed. *Fileson v. Ullman*, 1943, 63 S.Ct. 493, 318 U.S. 44, 87 L. Ed. 603.

THIRD GROUND: No right to appeal under 28 U.S.C.A. 1257 (2).

The Tennessee Court did not decide the issue of whether the State Legislature unconstitutionally impaired existing contractual obligations but based its decision upon the preliminary issue that the Contract Clause does not protect Appellant, a local governmental agency. (A.31) This is admitted by Appellant (J.S.p.3) yet it seeks to appeal under 28 U.S.C.A. 1257 (2) which authorizes appeal only from final judgments of State Courts which have found in favor of the validity of a state statute which has been challenged as repugnant to the Constitution, treaties or laws of the United States.

The Tennessee decision does not fit into the mold of that law.

The rule in this situation is:

> "It is plain that appeal may not be had on the ground that a state statute could have furnished a basis for, if the state courts have in fact rested decision solely on other grounds." Wright, Miller, Cooper, Gressman, Jurisdiction § 4012 at 609. This textbook cited *May v. Anderson*, 1953, 73 S. Ct. 840, 841 & n. 2, 345 U. S. 528, 530, & n. 2, 97 L. Ed. 1221. Also see *Zucht v. King*, 1922, 43 S. Ct. 24, 25, 260 U. S. 174, 177, 67 L. Ed. 194, cited *Wright, Miller*, etc. Id. at 616.

Other arguments made by Appellant are not considered pertinent to the issues now before this Honorable Court. Appellant clearly has no right to appeal under the Federal Code cited because the federal question sought to be reviewed was not expressly passed on by the Tennessee Supreme Court.

CONCLUSION

1. Under the Third Ground of this Appellee's Motion to Dismiss, it is obvious that Appellant has no right to appeal from the decision by the State Court.

2. Under the First Ground of Appellee's Motion to Dismiss, it is apparent from Appellant's Jurisdictional Statement and the Appendix thereto, that this Appellee is not in any contractual relationship with Appellant. Appellant attempted to get this Appellee into some such relationship through the application of the Tennessee law of estoppel. Both the Chancellor and the Court of Appeals found no basis for application of this law against this Appellee. This appeal is so lacking in substance as to be frivolous.

3. Even assuming this Appellee wrong in its position expressed in the preceding grounds, there is no substantial federal question in view of the prior decisions of this Honorable Court. Appellant's claim that it has protection under the Contract Clause is frivolous.

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Tennessee.

Respectfully submitted,

HARRY MITTWEDE
Attorney for Appellee
Metropolitan Government of Nashville and Davidson County, Acting by and Through the Electric Power Board of Said Government (Nashville Electric Service)

Certificate

I hereby certify that copy of the foregoing has been deposited in a United States Post Office of mail box, with first class postage prepaid, to Honorable Joseph L. Lackey, Jr., 421 Charlotte Avenue, Nashville, Tennessee 37219, Attorney for the Appellant, and to Honorable J. O. Bass, First American Center, Nashville, Tennessee 37238, Attorney for all Appellees except Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board.

Harry Mittwede
Attorney for Metropolitan Government of Nashville and Davidson County, acting by and through the Electric Power Board of said Government